

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

MICKEY EAST,)
) C.A. No. K11A-08-006 JTV
 Appellant,)
)
 v.)
)
 IGT,)
)
 Appellee.)

Submitted: July 25, 2012
Decided: October 17, 2012

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware.
Attorney for Appellant.

John J. Ellis, Esq., Heckler & Frabizzio, Wilmington, Delaware. Attorney for
Appellee.

Upon Consideration of Appellant's
Application For Attorney's Fees
DENIED

VAUGHN, President Judge

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ORDER

Upon consideration of the appellant's Motion for Attorney's Fees, the appellee's response, and the record of the case, it appears that:

1. This case began with the appellant, Mickey East ("the claimant"), filing a petition with the Industrial Accident Board ("the Board") to recover payment for a medical bill. The Board ruled that the bill had been properly paid by the appellee, IGT ("the employer"), and dismissed the petition. The claimant then appealed to this Court contending that (1) the Board's decision was not supported by substantial evidence and (2) that the summary dismissal of his claim by the Board deprived him of due process. This Court ruled against the claimant on his due process claim, but remanded the case back to the Board regarding the first contention.¹ The Court concluded that the Board had not specifically explained why it found that the bill had been paid. After the Court issued that ruling, the claimant moved for an award of attorney's fees. The Court denied the motion on the ground that it had not affirmed the claimant's position on appeal.

2. Subsequently, the Board reheard the case and again concluded that the medical bill had been properly paid by the employer.

3. The claimant has now filed this second appeal. In this appeal, he moves for an award of attorney's fees for the time spent in connection with the first and second appeals. No other issue is raised in this appeal.

4. 19 *Del. C.* § 2350(f) provides:

¹ *Mickey East v. International Game Tech.*, 2011 WL 3568457 (June 30, 2011).

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The Superior Court may at its discretion allow a reasonable fee to claimant's attorney for services on an appeal from the Board to the Superior Court and from the Superior Court to the Supreme Court where the claimant's position in the hearing before the Board is affirmed on appeal. Such fee shall be taxed in the costs and become a part of the final judgment in the cause and may be recovered against the employer and the employer's insurance carrier as provided in this subchapter.

5. This section “was enacted to prevent the depletion of awards granted by the Board by fees generated by the appeal of such awards by employers, where the award granted is ultimately upheld on appeal.”² For this statute to apply, an appeal must be taken from a ruling of the Board favorable to the claimant, and the claimant's position during that appeal must ultimately be upheld.³ A claimant may also initiate an appeal of an unfavorable Board decision and, if successful, may petition the Court for an attorney's fee.⁴ “The clear legislative intent of the amendment is to create a right for a claimant to seek an attorney's fee for the time expended at the appellate level when a claimant appeals an unfavorable or erroneous Board decision and claimant's position before the Board is affirmed on appeal.”⁵ The Court should not simply look at whether the claimant was successful on appeal or what action the court

² *All Am. Eng'g Co. v. Price*, 348 A.2d 333, 335 (Del. Super. 1975).

³ *Id.*

⁴ *Murtha v. Cont'l Opticians, Inc.*, 729 A.2d 312, 317 (Del. Super. 1997).

⁵ *Id.*

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took, but the Court must look to whether the claimant's position before the Board was affirmed on appeal.⁶

6. This Court has already concluded in the above-mentioned prior ruling that the claimant was not entitled to an attorney's fee in connection with the first appeal. In this current appeal, nothing has changed. The Board has again ruled against the claimant, and the Board's decision is not challenged in this appeal. There is no basis upon which to conclude that the position of the claimant before the Board has been affirmed. Therefore, there is no basis for an award of attorney's fees.

7. For the aforementioned reasons, appellant's Motion for Attorneys' Fees appeal is **denied**.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File

⁶ *Green v. ConAgra Poultry Co.*, 2007 WL 2319146, at *7 (Del. Super. July 11, 2007) *aff'd sub nom. ConAgra/Pilgrim's Pride, Inc. v. Green*, 954 A.2d 909 (Del. 2008).